Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

RICHARDS HICKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. Is Petitioner entitled to a new sentencing hearing pursuant to *Booker v. United States*, __U.S.__, 125 S.Ct. 738 (2005)?

II. The Fifth Circuit erred in not requiring proof beyond a reasonable doubt that Petitioner's actions caused the death of the officer.

III. Is the Fifth Circuit's definition of exigent circumstances in conflict with Supreme Court caselaw?

PARTIES TO PROCEEDINGS

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Petitioner, RICHARD HICKS, hereby petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit (entered November 2, 2004) affirming Petitioner's conviction and sentence for violating 18 U.S.C. §922(g)(8) by possessing firearms and ammunition while he was subject to a domestic violence restraining order. A Petition for Rehearing was filed on November 19, 2004 and denied on December 7, 2004.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated November 2, 2004 is styled *United States v. Richard Hicks*, and is found at 389 F.3d 514 (5th Cir. 2004). A copy of this opinion is found at Appendix A. Petition for Rehearing was denied on December 7, 2004 and the rehearing denial is noted in the published opinion of the Court of Appeals and found at Appendix B.

STATEMENT OF JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Petitioner recognizes that this Petition is untimely. The following is the reason for the untimeliness and Petitioner requests that the Petition be accepted and acted upon.

I.

On November 2, 2004, the Court of Appeals issued an opinion affirming the conviction and sentence in this case. One issue raised on appeal concerned the Sixth Amendment violation at sentencing of considering enhancement factors not found by a jury. The Court denied this ground on the

authority of *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004). Petitioner filed a timely Petition for Rehearing that was denied on December 7, 2004. On December 15, 2004, the Court issued the mandate in this case.

II.

On January 12, 2005, the Supreme Court issued its opinion in *United States v. Booker*, 125 S.Ct. 738 (2005). Under *Booker*, Petitioner's case will definitely require a resentencing. Petitioner's counsel made a specific and proper objection at the sentencing hearing and therefore this is a preserved *Booker* error.[1]

III.

Counsel, Gary A. Udashen, represented Petitioner on the appeal to the Court of Appeals and is representing Petitioner on this motion and all further proceedings in this case. However, after the denial of the Petition for Rehearing, Petitioner, Richard Hicks, was approached by a fellow inmate at the Federal Prison where he is incarcerated who convinced Petitioner to retain the services of attorney Roderick E. Smith of Kansas City, Missouri to file a Petition for Writ of Certiorari. Petitioner's parents retained Mr. Smith to perform this service and counsel, Gary A. Udashen, provided Mr. Smith with his entire file of this case. The due date for the Petition for Writ of Certiorari was March 7, 2005. However, on that day, rather than file the Petition, Mr. Smith filed a

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[1] Petitioner raises additional Grounds for Review in his Petition for Writ of Certiorari. Since the misconduct of his counsel, as set out below, also denied his right for review on these additional grounds, Petitioner also asks that they be accepted by the court.

Motion for Extension of Time requesting that the Supreme Court extend the filing date from March 7, 2005 to May 6, 2005. This motion was denied by Justice Scalia.

Counsel, Gary A. Udashen, has been informed that Mr. Smith has failed and refused to communicate with the Petitioner or his family. In fact, Petitioner was not aware that the Petition for Writ of Certiorari was not filed until a substantial period of time passed from when it was due. Mr. Smith never informed Petitioner or his family of this fact and they only learned this much later from other sources. He has further refused to refund the attorney fees paid to him and has refused to return counsel's file that was provided to him. Moreover, counsel, Gary A. Udashen, has been informed that the Fannin County, Texas District Attorney and Grand Jury is currently investigating Mr. Smith for theft in connection with the funds he received from Petitioner's parents. Counsel, Gary A. Udashen, has also received a communication from the Missouri State Bar Association, which is also investigating his actions in this case.

Attorney Smith, in fact, never told Petitioner or his family that the Petition had not been filed. Both Petitioner and his family made extensive efforts, over a period of months, to contact Smith both by letter and phone. Smith refused to speak to them or communicate with them in any way, even up to the present day. All efforts to find out why the Petition had not been filed and what Smith intended to do about the situation were met with silence.

Petitioner made diligent efforts to stay informed of the status of his case and was simply unable to due to the recalcitrance of Smith. Once it became clear that Smith had no intention of attempting to rectify the situation created by his failure to file the Petition, Petitioner made immediate

efforts to obtain different counsel to attempt to determine a way to have these issues reviewed by the Supreme Court.

IV.

After Petitioner and his family learned of the above facts, counsel Gary A. Udashen was contacted and asked to determine what could be done to alleviate this situation. Subsequently, on July 11, 2005, counsel on behalf of Petitioner filed Appellant's Motion to Recall Mandate and Accept Late Petition for Rehearing with the Court of Appeals. On July 20, 2005, the Court of Appeals denied that motion. (See attached documents filed with Court of Appeals and Court of Appeals order).

V.

Petitioner asks the Supreme Court to accept, file and consider this out of time Petition for Writ of Certiorari. This Court has jurisdiction and authority to grant this request. The time limits set out in the Supreme Court rules for filing a Petition for Writ of Certiorari are not jurisdictional in criminal case and can be waived by the Supreme Court. *See*, *Schacht v. United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); *Durham v. United States*, 401 U.S. 481, 91 S.Ct. 858, 28 L.Ed.2d 200 (1971); *Stutson v. United States*, 516 U.S. 193, 116 S.Ct. 600, 133 L.Ed.2d 571 (1996).

VI.

Based on the above facts, it would constitute a complete miscarriage of justice to not allow Petitioner an opportunity for this court to consider whether he should receive a new